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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 RODNEY BERNARD BARNO,
12 Petitioner,
13 vs.
14 ROBERT J. HERNANDEZ, Warden,
Respondent.

CASE NO. 08cv2439 WQH (AJB)
ORDER

15 HAYES, Judge:

16 The matters before the Court are the Motion to Stay (Doc. # 2) filed by Petitioner
17 Rodney Bernard Barno; and the Report and Recommendation (Doc. # 22) filed by Magistrate
18 Judge Anthony J. Battaglia.

19 **Background**

20 On December 31, 2008, Petitioner initiated this action by filing the Petition for Writ of
21 Habeas Corpus (Doc. # 1), pursuant to 22 U.S.C. section 2254. The Petition alleges eleven
22 claims for relief. The eighth claim alleges that newly discovered evidence makes a compelling
23 showing of Petitioner's factual innocence. The ninth claim alleges ineffective assistance of
24 counsel on grounds that counsel failed to investigate, to object, and to call witnesses; argued
25 against Petitioner, his client, to the jury; and failed to preserve issues for appeal. The tenth
26 claim alleges prosecutorial misconduct on grounds that the prosecutor used false and perjured
27 testimony. The eleventh claim alleges that the cumulative effect of trial counsel's error
28 violated Petitioner's right to effective assistance of trial counsel.

On December 31, 2008, Petitioner filed the Motion to Stay. Petitioner requests that the Court stay and hold in abeyance the eighth, ninth, tenth and eleventh claims alleged in the Petition on grounds that the claims have not been exhausted in state court. On March 12, 2009, Respondent filed the Opposition to the Motion to Stay (Doc. # 18). Respondent opposes the Motion to Stay on grounds that Petitioner has failed to show good cause for his failure to exhaust the eighth, ninth, tenth and eleventh claims, and that the unexhausted claims lack merit. On March 23, 2009, Petitioner filed the Reply to the Motion to Stay (Doc. # 21).

On April 20, 2009, the Magistrate Judge filed the Report and Recommendation (“R&R”) (Doc. # 22) recommending that this Court deny the Motion to Stay. The R&R concluded that Petitioner has failed to establish good cause for his failure to exhaust his claims in state court; that Petitioner has failed to provide sufficient facts for the Court to determine whether his claims are potentially meritorious; and that Petitioner lacked diligence in pursuing his claims. On June 22, 2009, Petitioner filed Objections to the R&R (Doc. # 29). Respondent has not filed a Reply.

Standard or Review

The duties of the district court in connection with a Report and Recommendation of a Magistrate Judge are set forth in Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1). When the parties object to a Report and Recommendation, “[a] judge of the [district] court shall make a de novo determination of those portions of the [Report and Recommendation] to which objection is made.” 28 U.S.C. § 636(b)(1); *see Thomas v. Arn*, 474 U.S. 140, 149-50 (1985). A district court may “accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1).

Analysis

Petitioner asserts that he has established good cause for failing to exhaust the eighth, ninth, tenth and eleventh claims alleged in the Petition for the following reasons: “Lack of education and legal training, including scarcity of relevant legal materials in prison library. Library access is very limited and had difficult time obtaining facts and witnesses while in

1 custody. Lack of funds to retain investigator or lawyer at this time.” *Mot. to Stay*, p. 3.
2 Petitioner also asserts that “the new claims were not addressed on direct appeal because the
3 facts were outside the record on appeal and newly discovered evidence did not surface until
4 after the appeal was final in some cases.” *Reply*, p. 1.

5 The R&R concluded that Petitioner’s assertions that he had limited access to the library
6 and that there was a scarcity of relevant legal materials in the library do not establish good
7 cause because “Petitioner has not shown how he had limited access to the library or what
8 specific legal materials he needed that [were] lacking.” *R&R*, p. 4. The R&R concluded that
9 the Petitioner’s assertions that he had a difficult time obtaining facts and witnesses while in
10 custody and lacked funds to retain an investigator or lawyer do not establish good cause
11 because Petitioner presents no “factual support explaining why or how it was difficult to obtain
12 facts and witnesses and why he needed an investigator or lawyer.” *Id.* The R&R concluded
13 that the “factual predicate of the unexhausted claims of ineffective assistance of counsel, his
14 ‘newly’ discovered evidence of factual innocence and prosecutorial misconduct[,] has been
15 known to the Petitioner since his direct appeal was completed on January 7, 2008.” *Id.* at 4-5.
16 The R&R concluded that Petitioner “has not explained why this additional evidence was not
17 available at the time of trial and only discovered near the expiration of the statute of limitations
18 date.” *Id.* at 4-5. Based on the foregoing, the R&R concluded that Petitioner failed to establish
19 good cause for his failure to exhaust the eighth, ninth, tenth and eleventh claims in state court.

20 Petitioner objects to the conclusion by the Magistrate Judge that Petitioner has not
21 established good cause for failing to exhaust his claims. Petitioner contends that he has shown
22 that his new evidence was not discovered until after the conclusion of his direct appeal due to
23 circumstances beyond his control; that he was confused about various filing deadlines; that the
24 prison library was obstructing his access to the court; and that he was denied copies of exhibits
25 necessary to establish the merits of his claims. Based on the foregoing, Petitioner contends
26 that the R&R incorrectly concluded that he has failed to establish good cause for his failure to
27 exhaust the eighth, ninth, tenth and eleventh claims.

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1 A federal court has the discretion to grant a stay and hold a federal habeas corpus
2 petition in abeyance to permit a petitioner to exhaust state court remedies if: (1) the petitioner
3 has “good cause” for his failure to exhaust his claims in state court; (2) the unexhausted claims
4 are potentially meritorious; and (3) there is no indication that the petitioner intentionally
5 engaged in dilatory litigation tactics. *Rhines v. Weber*, 544 U.S. 269, 275-78 (2005).

6 The unexhausted claims in the Petition allege that newly discovered evidence shows his
7 factual innocence, challenge the effectiveness of Petitioner’s trial counsel, and challenge the
8 conduct of the prosecutor. The purported newly discovered evidence relates to events that
9 occurred during Petitioner’s trial. Petitioner does not articulate any legally recognizable reason
10 why he was unable to discover this purported new evidence before filing his original petition
11 in state court. The Court finds that the R&R correctly determined that Petitioner “has not
12 explained why this additional information was not available at the time of trial and only
13 discovered near the expiration of the statute of limitations date.” *R&R*, p. 5. Petitioner asserts
14 that he has shown good cause for failing to exhaust his eighth, ninth, tenth and eleventh claims
15 based on his confusion about various filing deadlines, difficulties with respect to library access,
16 and denial of exhibits necessary for the merits of his case. Petitioner’s lack of legal knowledge
17 and literacy do not establish good cause. *See Hughes v. Idaho State Bd. of Corrections*, 800
18 F.2d 905, 909 (9th Cir. 1986); *Smith v. Giurbino*, 2008 W.L. 80983 (S.D. Cal. 2008).
19 Petitioner has not shown with any specificity how he had limited access to the library, or what
20 legal materials or exhibits he needed that were lacking. *See Lindquist v. Idaho State bd. of*
21 *Corrections*, 776 F.2d 851, 858 (9th Cir. 1985). The Court has reviewed Petitioner’s
22 Objections and the R&R’s conclusion that Petitioner has failed to establish good cause for
23 failing to exhaust his eighth, ninth, tenth and eleventh claims, and concludes that the
24 Magistrate Judge correctly determined that Petitioner has not established good cause. In light
25 of Petitioner’s failure to establish good cause, the Court concludes that the R&R correctly
26 determined that the Motion to Stay should be denied on grounds that Petitioner has failed to

1 meet the requirements set forth in *Rhines*, 544 U.S. 269.¹ The Court adopts the R&R's
2 conclusion the denial of the Motion to Stay is proper on grounds that Petitioner has failed to
3 establish good cause for his failure to exhaust his claims in state court.

4 **Conclusion**

5 IT IS HEREBY ORDERED that (1) the Report and Recommendation's (Doc. # 22)
6 is **ADOPTED** in its entirety; and (2) the Motion to Stay (Doc. # 2) is **DENIED**.

7 DATED: August 10, 2009

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9 **WILLIAM Q. HAYES**
10 United States District Judge

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¹ Petitioner also objects to the R&R's conclusions that "[t]he Court cannot make a
25 determination on whether the claims have merit or not because his additional evidence [is] referenced
26 in the petition and motion for stay and abeyance through numerous exhibits," but that Petitioner "has
27 failed to attach the exhibits to the petition and the motion for stay and abeyance;" that Petitioner "has
28 failed to demonstrate that he acted diligently;" and that Petitioner will not be barred from returning
to this Court because the statute of limitations has not run on his federal petition. *See Objections*, p.
2-3, 7, 9; *R&R*, p. 4-5. Petitioner's failure to establish good cause for failing to exhaust his eight,
ninth, tenth and eleventh claims is itself sufficient to deny the Motion to Stay under *Rhines*, 544 U.S.
269. The Court therefore will not address these additional bases for denial of the Motion to Stay.